No. 03-544

IN THE

Supreme Court of the United States

JEAN BROOKS POWERS,
AS THE SURVIVING SPOUSE AND ADMINISTRATRIX OF THE
ESTATE OF HER DECEASED HUSBAND,
JOHN WALTER POWERS,

Petitioner,

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether the exclusive remedy of a state workers' compensation act can be circumvented either by this Court granting an implied a private right of action under The Urban Mass Transportation Act of 1964 contrary to the Act's purposes expressed by Congress in 49 U.S.C. §5301(f) or by this Court overruling its decision in *Collins v. City of Harker Heights, Texas,* 503 U.S. 115 (1992). As posed by the Petitioner, this question was trifurcated into 1) whether an implied private right of action existed, 2) whether Congress intended to pre-empt workers' compensation, and, 3) whether due process created a separate right to sue.

2.

Whether sovereign immunity prevents tort actions for bodily injuries to employees of public authorities operating rapid transit systems when sovereign immunity is expressly waived within a state's workers' compensation act and when said bodily injuries arise out of and in the course of employment with the public authority.

RULE 29.6 STATEMENT

The Metropolitan Atlanta Rapid Transit Authority is a governmental corporation not subject to Rule 29.6. The Georgia legislature created "a public body corporate to be known as the Metropolitan Atlanta Rapid Transit Authority as a joint public instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinett." *MARTA Act of 1965,* Ga. L. 1965, p. 2243. "MARTA, by creation and legislative enactment of the General Assembly, is a state created local public authority." *Williams v. MARTA*, 247 Ga. App. 52 (2000).

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Metropolitan Atlanta Rapid Transit Authority ("MARTA"), respectfully requests that this Court deny the petition for a writ of certiorari on the questions as filed by Petitioner in this case.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The Petitioner's statement of facts is accepted with clarifications. First, the Respondent Metropolitan Atlanta Rapid Transit Authority ("MARTA") disputes the statement of train operator Jennifer Armour that she was not notified that there were workers on the train tracks. Second, the facts, as recited in the Georgia Court of Appeals decision, include that a notice of claim was filed with Georgia State Board of Workers' Compensation, the injuries to the deceased were accepted as compensable under the Georgia Workers' Compensation Act, and benefits were being paid thereunder. The incident arose out of and in the course of employment.

The Georgia Workers' Compensation Act provides for what is known as the exclusive remedy provision of workers' compensation by specifically stating "[t]he rights and the remedies granted to an employee by this chapter shall **exclude all other rights and remedies** of such employee, his personal representative, parents, dependents, or next of kin, **at common law or otherwise, on account of such injury, loss of service, or death**." (emphasis added) Ga. Code Ann. §34-9-11(a) (1998) . "The rights and remedies of an employee against his or her employer for a work-related injury under the Workers' Compensation Act foreclose all other remedies at common law or otherwise for such injury, lost service or death" when a complaint pleads "a cause of action exclusively within the Workers' Compensation Act." *Kel-*

logg Company v. Pinkston, 253 Ga. App. 190, 191, 558 S.E.2d 423, 424 (2001) *cert. denied.*

The Estate of John Walter Powers is barred by the exclusive remedy provision of workers' compensation from making further claims for bodily injuries against Respondent and so too is his surviving spouse, Jean Brooks-Powers. Ga. Code Ann. §34-9-11(a), *Gulf States Ceramic v. Fenster*, 228 Ga. 400, 185 S.E.2d 801 (1971), *Ponder v. Southern Tea Co.*, 170 Ga. App. 819, 318 S.E.2d 242 (1984).

Workers' compensation systems in every state are predicated on the exclusive remedy principle. Hence, in order to sustain a cause of action against Respondent, Petitioner attempts an end run around the exclusive remedy provision by asserting an implied private right of action under the Urban Mass Transportation Act of 1964 ("UMTA"), 78 Stat. 302, 49 U.S.C. §5301 *et sequitur* and by asserting due process violations of a right to a safe work environment.

I. RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE PETITION

A. Petitioner Has No Implied Right To Sue For Bodily Injuries Under UMTA.

1. Congress did not intend to pre-empt state workers' compensation acts.

If Congress had wanted to pre-empt state workers' compensation acts to allow transit workers to sue for injuries arising out of and in the course of employment, it could have merely cited to the Federal Employers' Liability Act of 1908 ("FELA"), 35 Stat. 65, 45 U.S.C. §51, *et sequitur* when enacting the Urban Mass Transportation Act of 1964 ("UMTA"). Since Congress did not do so, the clear intent of Congress in enacting UMTA was to leave the statutory coverages unaffected. Hence commuter rail systems fall under FELA while rapid transit systems such as MARTA fall under workers' compensation. *Ferguson v. Philadelphia Transp. Co.*, 205

F.2d. 520 (3rd Cir. 1953) *cert. denied* 346 U.S. 867 (1953), *Chicago Transit Authority v. Flohr*, 570 F.2d 1305 (7th Cir. 1977), *Felton v. Southeastern Pennsylvania Transportation Authority*, 952 F.2d 59 (3rd Cir. 1991), See *Williams v. MARTA,* 247 Ga. App. 52 (2000) *cert. denied* (holding that when the Georgia legislature waived sovereign immunity it intended MARTA to be under the Workers' Compensation Act, not the Georgia Employers' Liability Act ("GELA") Ga. L. 1909, p. 160, Ga. Code Ann. §34-9-40 (1998)).

2. Congress clearly stated its intent in 49 U.S.C. §5301(f).

Petitioner claims implied rights under the Urban Mass Transportation Act of 1964 ("UMTA"). The provisions cited by the Petitioner are 49 U.S.C. §5329 and 49 U.S.C. §5330. These provisions do not provide for individual private rights to sue. They are purely regulatory agency enabling acts. 49 U.S.C. §5329(a) authorizes the Department of Transportation to "withhold further financial assistance." 49 U.S.C. §5330(b) limits the withholding to "not more than 5% of the amount required to be appropriated." Congress obviously did not intend to interfere with state workers' compensation schemes since these provisions deal purely with federal funding as the only intended remedy for agency regulatory enforcement.

The Petitioner's assertion that the purpose of Congress in passing UMTA was to provide transit workers with a way around workers' compensation is without basis. Moreover, the Petitioner's reliance on The Code of Federal Regulation as evidence of Congressional intent is wholly erroneous since the CFR is a mere promulgation by agency civil servants, not Congressional legislative history. Congress' stated intent was codified in 49 U.S.C. §5301(f) as follows:

> f) General purposes - The purposes of this chapter are –

> (1) to assist in developing improved mass transportation ...
>
> (2) to encourage ... mass transportation systems needed for economical and desirable urban development ...
>
> (3) to assist States and local governments and their authorities in financing ...
>
> (4) to provide financial assistance to State and local governments and their authorities to help carry out national goals ...
>
> (5) to establish a partnership that allows a community, with financial assistance from the Government, to satisfy its urban mass transportation requirements.

Nowhere in 49 U.S.C. §5301(f) is there any support for Petitioner's assertions.

In trying to avoid the implications of 49 U.S.C. §5301(f), the Petitioner relies on 49 U.S.C. §5329(a) which provides:

> The Secretary of Transportation **may investigate a condition** in equipment, a facility, or an operation **financed under this chapter** that the Secretary believes causes a serious hazard of death or injury to establish the nature and extent of the condition and how to eliminate or correct it. **If the Secretary establishes that a condition causes a hazard**, the Secretary **shall require** the local governmental authority receiving amounts under this chapter to submit **a plan for correcting it**. The Secretary **may withhold further financial assistance** under this chapter **until a plan is approved and carried out**. (emphasis added)

This statutory provision is incomplete in its scope. Its incompleteness self-proves the lack of congressional intent to

create a comprehensive remedy for employee injuries arising out of and in the course of employment. First, Congress did not apply this statute to the equipment, facilities or operations of MARTA financed by state funds, local sales taxes and passenger fares. Congress left out quite a bit of MARTA's operations and facilities. Second, Congress made the provision discretionary and the Secretary can pick and chose what he wants to investigate. Congress left out quite a bit of what happens. Third, the remedy is one of correction not compensation or punishment. Congress did not intend to provide recompense for injuries or to take away scarce resources from local authorities. Fourth, Congress allowed the Secretary to use his discretion to withhold further funding, in other words, to put a pause on currently federally funded purchases or construction, until a plan is in place. Congress imposed no other remedy nor intended to do so.

Moreover, 49 U.S.C. §5329 refers to passengers in §§(b)(3) and employees in §§(b)(4). Therefore, if this Court accepts Petitioner's premise that employees have an implied right to sue under UMTA and under 42 U.S.C. §1983 for deprivation of due process, then it must find that passengers do also, thus further opening the floodgates of litigation. Literally every bus fender bender and every rail station slip and fall would be a federal case.

3. The burden of proof required to show an implied right under federal statute is restrictive.

This Court has enunciated legal tests to be applied in determining whether an implied right exists. The Georgia Court of Appeals followed the correct federal analysis for the existence of an implied right to sue as previously applied by the local Circuit court to the Respondent. The Georgia Court of Appeals cited to *Noe v. MARTA*, 644 F.2d 434 (5th Cir. 1981) *cert. denied* 454 U.S. 1126. for the proposition that "[a] plaintiff who asserts the existence of an implied right of action bears the burden of establishing that proposition."

Brooks-Powers v. MARTA, 260 Ga. App. 390, 392, 579 S.E.2d 802, 805 (2003). The analysis by the Georgia Court of Appeals was guided by the analysis in *Noe v. MARTA* which explained that:

> In *Cort* [*v. Ash*, 422 U.S. 66 (1975)] the Supreme Court established a four-pronged test to be applied ...
>
> (1) Is the plaintiff a member of the class for whose special benefit the statute was created?
>
> (2) Is there any indication of legislative intent either to create or deny the remedy sought?
>
> (3) Is it consistent with the underlying statutory purposes to imply a remedy such as that sought?
>
> (4) Is the cause of action one that is traditionally relegated to state law so that it would be inapproriate to infer a cause of action based solely on federal law?
>
> ... The [*Cort*] decision was far more restrictive than earlier ones.
>
> ....
>
> In *Touche Ross* [*& Co. v. Redington*, 442 U.S. 560 (1979)] the Court enunciated its new approach, that the task of federal courts in cases such as this was limited *solely* to determining whether Congress intended to create the private right of action being asserted in a given case. Consistent with that shift in analytic framework the Court considered the first two criteria set out in *Cort* and, finding them not to be satisfied, declined to consider factors three and four.
>
> ....

> *Transamerica Mortgage Advisors, Inc. v. Lewis,* [444 U.S. 11 (1979)] continued the trend of further restricting those situations in which private actions would be implied ... the Court based its decision solely on the second factor in *Cort.*
>
> *Noe v. MARTA,* at 436-7.

Respondent now shows this Court that the Petitioner cannot meet the four standards of *Cort* as applied in *Noe v. MARTA.*

(1) First, "the protection and benefit of the party seeking such action must be the 'primary congressional goal' of the statute , or, as another has stated it, 'the plaintiff must be the primary beneficiary of the statute.'" *Noe v. MARTA* at 437. Here, Petitioner cannot show that the primary congressional goal of UMTA was to make the Petitioner the primary beneficiary of UMTA in the face of 49 U.S.C. §5301(f).

(2) "The second criteria of *Cort* is that there be an indication of legislative intent to create or deny the remedy sought." *Noe v. MARTA* at 438. There is nothing in the statute to expressly indicate Congress intended to create recompense for accident victims or to punish local authorities. When Congress exercised its discretion to chose a penalty power for the Secretary of Transportation, it eschewed recompense and punishment. Instead 49 U.S.C. §5329 allows the Secretary only to withhold additional funding for specific new projects until a correction plan is submitted.

(3) "The third factor is whether it is consistent with the underlying statutory purpose to imply a remedy such as that sought." *Noe v. MARTA* at 439. The purposes expressed by Congress in 49 U.S.C. §5301(f) are inconsistent with Plaintiff's requested remedies. It is inconsistent with UMTA to redirect society's scarce resources into punitive damages. It is inconsistent with UMTA to imply a remedy Congress specifically omitted. Congress and state legislatures created

remedies for employees of local rapid transit authorities and commuter rail authorities, *viz.*, the Federal Employers Liability Act (FELA), the Georgia Employers Liability Act (GELA), and the Georgia Workers Compensation Act. See *Williams v. MARTA*, 247 Ga. App. 52 (2000).

(4) "The fourth and final criteria is that the cause of action must not be one that is traditionally relegated to state law." *Noe v. MARTA* at 439. Clearly the claim for the wrongful death of John Powers is a traditional state law negligence tort. It is a train accident allegedly caused by negligence of the train operator and the contributory negligence of John Powers.

4. Congressional intent is strictly construed.

The Georgia Court of Appeals decision is faithful to the 11th Circuit precedent in *Local Division 732, Amalgamated Transit Union v. MARTA*, 667 F.2d 1327 (11th Cir. 1982) which provided implied rights must be strictly construed.

> Displaying what has been described as a drastic change in attitude, the Supreme Court has imposed increasingly severe restrictions on the availability of implied causes of action under federal statutes.
>
> . . . .
>
> If we are to conclude that Congress meant more than it said when it enacted a statute, we must do so on the basis that Congress actually intended to legislate as we infer ... In order for us to infer a private right of action, or federal jurisdiction, we must have before us clear evidence that Congress intended to provide such a remedy and if the legislative history provides no clear indication one way or the other, so that clear evidence of affirmative congressional intent is lacking, we cannot infer that Congress has legislated silently. (citations omitted)
>
> *Local Div. 732, ATU v. MARTA*, at 1334-5.

Petitioner cites no committee proceedings, no testimony before Congress and no Congressional debate to establish in the legislative history a congressional intent to create an implied right to sue or to pre-empt state workers' compensation acts.

B. Petitioner Has No Cause Of Action Under The Due Process Clause.

1. The exclusive remedy of workers' compensation does not violate due process under state law.

The Georgia Supreme Court has upheld the constitutionality of the Georgia exclusive remedy. The Georgia Supreme Court emphatically stated "[w]e also reject [arguments] that the immunity granted employers in the workers' compensation act violates the due process and equal protection provisions of the State and Federal constitutions." (citations omitted) *Georgia Department of Human Resources v. Joseph Campbell Company*, 261 Ga. 822, 823-4, 441 S.E.2d 871, 873 (1992). The exclusive remedy bar also applies to suits against co-workers. In that context, constitutional attacks grounded on violations of "Georgia's due process clause and Georgia's equal protection equivalent" were rejected by the Georgia Supreme Court which held the bar was "not unconstitutional for any reason alleged." *Williams v. Byrd*, 242 Ga. 80, 80-1, 247 S.E.2d 874, 875 (1978). In a challenge to the exclusive remedy bar to a loss of consortium claim, the Georgia Supreme Court held that "the claim of constitutional deprivation is without merit." *Henderson v. Hercules, Inc.*, 253 Ga. 685, 686, 324 S.E.2d 453, 454 (1985).

2. The exclusive remedy of workers' compensation does not violate due process under federal law.

The Constitution is the supreme law of the land. The exclusive remedy of workers compensation cannot bar constitutional torts. Hence this Court has distinguished state law

traditional torts of negligence from constitutional torts. This Court stated "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan,* 443 U.S. 137, 146 (1979).

When presented with a workers' compensation claim dressed up as a due process violation of an express statutory right granted by Texas, this Court preserved the exclusive remedy by simply saying the action was outside the realm of constitutional law. In the case of *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992) the widow of a city sanitation employee brought suit when her husband died of asphyxia after entering a manhole to unstop a sewer line in the course of his employment. The widow alleged that the husband "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the [city's] custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at jobsites, and not providing safety warnings." *Id.* at 117. Additionally, she alleged "that a prior incident had given the city notice of the risks of entering the sewer lines and that the city had systematically and intentionally failed to provide the equipment and training required by a Texas statute." *Id.* at 118. Thus we have a fact pattern which is on point to the fact pattern in the case *sub judice.*

This Court stated "[e]ven though the city's conduct may be actionable under state law, we hold that §1983 does not apply because such conduct does not violate the Due Process Clause." *Id* at 117. Then this Court turned to the express violation of the Texas Hazard Communication Act, a safety statute, and stated: "[w]e also assume ... that the [Texas] Act created an entitlement that qualifies as a 'liberty interest' protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the

constitutional sense. The reasons why the city's alleged failure to train and warn did not constitute a [constitutional deprivation of substantive due process] apply *a fortiori* to the less significant liberty interest created by the Texas statute." (citations omitted) *Collins v. City of Harker Heights,* at 129.

This Court refused to create a substantive due process exception for a workers' compensation claim involving the express violation of a state-law safety statute specifically designed to prevent the harm that occurred. Petitioner would have this Court create a substantive due process exception for a workers' compensation claim based on an invented implied right to sue under a generally designed federal funding statute not specifically designed to prevent the harm which occurred.

3. *Prior to* Collins, *lower courts had also distinguished workers' compensation from constitutional torts.*

The Supreme Court of Idaho was faced with a similar fact pattern to the case *sub judice.* Municipal employees sued the City of Coeur D'Alene for exposure to asbestos under §1983 and the Idaho constitution. The Supreme Court of Idaho upheld the lower court's summary judgment that the suit was barred by Idaho's state workers' compensation exclusive remedy provision and that the §1983 action was barred because it was historically applied to deliberate decisions of government officials to deprive a person of life, liberty or property, not to mere negligence. *DeMoss v. City of Coeur D'Alene,* 118 Idaho 176, 795 P.2d 875 (1990).

The U.S. Court of Appeals for the District of Columbia has also ruled that using §1983 as an end run around the exclusive remedy provision failed constitutional muster: "whatever ... rights may be under state law ... [there] is no constitutional right to a safe working environment ... [therefore] failure to remedy safety problems ... is not actionable under section 1983 as a deprivation of a Fourteenth Amend-

ment liberty interest without due process of law." *Washington v. District of Columbia,* 802 F.2d 1478, 1482 (D.C. Cir. 1986).

The Second Circuit also determined to protect the integrity of the workers compensation system when faced with a due process challenge. The case of *McClary v. O'Hare,* 786 F.2d 83 (2nd Cir. 1986) is on point with the case *sub judice.* "McClary died ... in the course of his employment ... when a wire cable on a mobile truck crane being operated by a fellow employee broke ... [and] his wife, administratrix of his estate, brought suit under 42 U.S.C. §1983 ... [and] alleged the crane operator did not have a certificate of competency, contrary to N.Y. Gen. Bus. Law § 482 (McKinney 1984)." *McClary* at 84. The Second Circuit affirmed the United States District Court's dismissal. The Second Circuit noted that Mrs. McClary's complaint "attempts to elevate the claim from one sounding in state tort law to one of constitutional dimensions, under the rubric of procedural due process." *Id.* at 86. The Second Circuit quickly perceived the implications and concluded:

> ... any claim against a state or local official that sounds in tort can be pleaded, as this one is, as an 'established state procedure' case.
>
> ....
>
> Appellant claims that the exclusive remedy under state law, the Workers' Compensation Law, is inadequate because its exclusivity provisions constitute an invidious form of discrimination and deprivation of due process and equal protection of the laws by depriving employees of the right to recover damages from the employer outside of Workers' Compensation. That contention simply cannot stand. Workers' Compensation statutes, which impose liability without fault on employers' insurers with respect to claims by employees or their per-

> sonal representatives, have been substantively upheld against due process challenge time and again in the Unitied States Supreme Court. *See Crowell v. Benson,* 285 U.S. 22, 42, 52 S.Ct. 282, 289, 76 L.Ed. 598 (1932) (citations omitted). While workers' Compensation in this case may not be as fully compensatory as a suit under section 1983 would be, the federal Constitution does not set a standard so high as to require total compensation for all injuries. *See Parratt [v. Taylor]*, 251 U.S. at 543-44, 101 S.Ct. at 1916-17.
>
> . . . .
>
> As the [Supreme] Court stated in *Baker v. McCollan,* 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979), "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." We do not think that improper actions taken by employers violate an employee's substantive due process rights simply because that employer is a government official.... In sum, under these circumstances, the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer.
>
> *McClary* at 87-89.

4. Analysis of a §1983 claim against a governmental entity.

The Georgia legislature created "a public body corporate to be known as the Metropolitan Atlanta Rapid Transit Authority as a joint public instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinett." *MARTA Act of 1965,* Ga. L. 1965, p.2243.

"MARTA, by creation and legislative enactment of the General Assembly, is a state created local public authority." *Williams v. MARTA*, 247 Ga. App. 52 (2000). Because MARTA is a local governmental entity, it is subject to constitutional analysis as applied by this Court in *Collins v. City of Harker Heights, Texas.* The *Collins* Court stated "proper analysis requires us to separate two different issues when a §1983 claim is asserted against a municipality: [a.] whether plaintiff's harm was caused by a constitutional violation, and [b.] if so, whether the city is responsible for that violation." (citation omitted) *Collins* at 120.

a. *Petitioner's harm was not caused by a constitutional violation.*

In order to make a §1983 claim, the Petitioner must find some constitutional right that has been allegedly violated. In the case *sub judice*, as in *Collins,* two possible approaches are used by the Petitioner. 1) The Petitioner can attempt to ground the constitutional rights violation on a substantive due process right to a safe working environment secured by the 14th Amendment. 2) The Petitioner can attempt to ground the constitutional rights violation on a 14th Amendment liberty interest in a safe working environment secured by a statutory safety provision. This Court rejected both approaches in *Collins.*

(1) *There is no due process right to a safe working environment.*

This Court clearly stated "[t]he Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.' Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm." (citations omitted) *Collins* at 129. In *Collins,* the plaintiff advanced "[1] that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or [2] that the City's 'deliberate indifference' to [Plaintiff's] safety was arbitrary

government action that must 'shock the conscience' of federal judges." *Collins* at 126. In the case *sub judice,* the Petitioner herein offers the same arguments. These arguments are doomed for the same reasons as they were in *Collins.* In *Collins* this Court stated the "[widow's] submissions that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented." *Collins* at 127. This Court distinguished prior cases by noting that they dealt with "a duty to take care of those who have already been deprived of their liberty." *Id.* And then this Court concluded that the widow could not maintain "that the City had deprived Collins of his liberty when it made, and he voluntarily accepted an offer of employment." *Collins* at 128. In the case *sub judice,* John Powers voluntarily accepted employment with MARTA.

There is no dispute over the underlying claim of the Petitioner being a typical state law wrongful death tort. The constitutional exceptions for "deliberate indifference" and "shocks the conscience" do not apply to typical state law torts. To dispose of Petitioner's arguments that the exceptions for "deliberate indifference" and "shocks the conscience" lift a state-law tort to the level of a constitutional deprivation of rights, Respondent need only paraphrase this Court's analysis in *Collins*:

> We also are not persuaded that [MARTA's] alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: [MARTA] breached its duty of care to her husband by failing to provide a safe working environment....we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.... Our refusal to

> characterize [MARTA's] alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. (citations omitted)
>
> *Collins* at 128.

The logic of *Collins* applies with equal force to Responent MARTA. MARTA's organizational structure is a "rational decisionmaking process that takes account of competing social, political and economic forces." Members of MARTA's Board of Directors are variously nominated and elected by the city, appointed by the counties, or are ex officio members by virtue of their public office. *MARTA Act of 1965,* § 6, Ga. L. 1965, p. 2243, as amended. The Board meetings are open to the public. *Id.* at § 6(h). The Board reports to each appointing governing body quarterly. *Id.* at § 6(k)(2). MARTA's contracts are open to public review. *Id.* at §9. A public hearing process is employed to set MARTA's fares (*Id.* at §9) and to set MARTA's annual budgets (*Id.* at §17).

(2) *There is no arbitrary deprivation of a liberty interest.*

In the second approach to attempting to find a constitutional violation, the Petitioner must find some due process or liberty interest violation of a statutorily granted right. Petitioner in the case *sub judice* argues that Respondent has violated Petitioner's due process rights and liberty interest by failing to provide a safe working environment secured by an implied right of private action under UMTA. This Court has already rejected both the due process and the liberty interest arguments. In *Collins*, the defendant employer had expressly violated the Texas Hazard Communication Act which provided penalties for the exact conduct of the defendant employer. This Court quickly disposed of the arguments stating:

> Finally, we reject petitioner's suggestion that the Texas Hazard Communication Act supports her substantive due process claim. We assume that the Act imposed a duty on the city to warn its sanitation employees about the dangers of noxious gasses in the sewers and to provide safety training and protective equipment to minimize those dangers. We also assume, as petitioner argues, that the Act created an entitlement that qualifies as a "liberty interest" protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense. The reasons why the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation of Collins' life apply *a fortiori* to the less significant liberty interest created by the Texas statute. (citation omitted)
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> *Collins v. City of Harker Heights, Texas* at 129-30.

The *Collins* rationale applies *a fortiori* to the weaker claim of Petitioner in the case *sub judice.* The Petitioner *sub judice* does not rely on an express violation of a safety statute written to prevent the specific conduct alleged to the employer defendant. Instead, Petitioner asserts that there was a violation of an "implied right" in a statute generally designed to accomplish general purposes other than prevent the specific conduct alleged by Petitioner.

b. *Even if there was a constitutional violation, MARTA cannot be held responsible under §1983.*

In *Collins,* this Court clarified its prior rulings on the issue of responsibility for §1983 violations and stated "municipalities may not be held liable 'unless action pursuant to official municipal policy of some nature caused a constitutional tort.'"(citations omitted) *Collins* at 121. "[A] munici-

pality cannot be held liable under § 1983 on a *respondeat superior* theory....'[T]herefore, a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983.'" (citations omitted) *Collins* at 121. In the case *sub judice* it is not alleged that Respondent has any official policy or custom of wrecking trains or running over employees. One worker's alleged negligence resulted in a co-worker's death.

Petitioner in the case *sub judice* attempts the same "shocks the conscience" argument that Mrs. Collins used to try and make a mere accident the official policy of a governmental entity. In *Collins,* the widow alleged the city followed, with "deliberate indifference," a custom and policy of not training its workers, not providing safety equipment and not providing safety warnings. *Id.* at 124, See also 117. However, this Court did not rule that this allegation of "deliberate indifference" was sufficient to establish a state action. Instead this Court merely assumed "for purposes of decision that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents ... that assumption does not confront the question of whether the complaint has alleged a constitutional violation." *Id.* at 124. This Court then went on to find there was no constitutional violation.

In 1998 this Court further explained *Collins* by noting that "in *Collins v. Harker Heights, supra,* at 128, we said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *County of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998). This Court further explained its decisions defining the constitutional sense of what is meant by "shocks the conscience." Shocks the conscience

does not refer to duties of care but to "the decencies of civilized conduct ... traditional ideas of fair play and decency ... interfer[ence] with rights implicit in the concept of ordered liberty." *Sacramento v. Lewis,* at 845-7. The case *sub judice* does not involve the constitution.

II. RESPONDENT'S QUESTION 2 INVOLVING SOVEREIGN IMMUNITY FURTHER SUPPORTS THE GEORGIA COURT OF APPEALS DECISION.

The questions as presented by the Petitioner are of no merit. However, before Petitioner's questions can be considered, the threshold question to be decided is whether the Georgia Legislature waived sovereign immunity thus allowing MARTA to be sued by employees for bodily injuries arising out of and in the course of employment. The Georgia Court of Appeals has determined that the waiver of sovereign immunity for a local rapid transit authority was conditioned on suits for bodily injury arising out of and in the course of employment being brought under workers' compensation. *Williams v. MARTA*, 247 Ga. App. 52, 542 S.E.2d 199 (2000), *cert. denied.* The Second Circuit has wrongly determined that a local rapid transit authority employee may sue in tort under FELA even though the authority is under workers' compensation. *Greene v. Long Island Railroad Company,* 280 F.3d 224 (2nd Cir. 2002) *cert. denied in Metropolitan Transportation Authority v. Greene,* No. 02-1173 (U.S. Supreme Court, May 19, 2003).

A. The Correct Test Is Whether A State Has Consented To Be Sued By Injured Workers As Enunciated In *Alden v. Maine.*

In *Alden v. Maine,* 527 U.S. 706 (1999), this Court interpreted and restated its decisions in *Parden v. Terminal Railway of Alabama Docks Dept.,* 377 U.S. 184 (1964) and

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991). Those decisions were explained by *Alden* to stand for "the narrow proposition that certain States had consented to be sued by injured workers covered by FELA, at least in their own courts." *Alden* at 737-38. Thus when examining the case *sub judice* the proper analysis must first begin by answering the question whether Georgia consented to MARTA being sued in tort (under GELA or FELA) or to being sued only under workers' compensation.

B. The Court Of Appeals Of Georgia Determined That Sovereign Immunity Was Waived Only For The Purposes Of Respondent Being Sued Under Workers' Compensation.

In *Williams v. MARTA*, 247 Ga. App. 52, 542 S.E.2d 199 (2000) *cert. denied,* the Georgia Court of Appeals had to determine whether Respondent was subject to being sued for employee injuries in tort under the Georgia Employer's Liability Act ("GELA"), Ga. Code Ann. §34-7-40 *et sequitur.* GELA is a state parallel to the Federal Employer's Liability Act of 1908 ("FELA"). If MARTA were to be found subject to GELA it could also be found to be subject to FELA.

The Georgia Court of Appeals examined the Georgia Workers' Compensation Act and noted that all state and local government authorities were included under the Act by the express provisions of Ga. Code Ann. §34-9-1(3). The Court of Appeals then noted that the Georgia Legislature in creating MARTA "expressly waived sovereign and governmental tort immunity as a part of its creation." citing to the MARTA Act of 1965, Ga. L. 1965, pp. 2243, 2275, §22. The Georgia Court of Appeals then concluded:

> Thus, under OCGA 34-9-1(3), the WCA [Workers' Compensation Act] defines "employer" as the "State of Georgia and all departments, instrumentalities, and authorities thereof"; authorities are subject to workers' compensation by express legislative man-

> date. While MARTA, as a local authority, is expressly excluded from sovereign immunity and governmental immunity, such waiver was conditioned upon MARTA's being governed by the WCA as all other authorities. (citations omitted)
>
> *Williams v. MARTA,* at 53, 201.

Thus the precedent established by the state court of last resort is that, for employee bodily injuries arising out of and in the course of employment, Respondent has waived its sovereign immunity only for the purpose of being sued under workers' compensation. Tort claims for injuries arising out of and in the course of employment cannot be brought against Respondent under GELA and FELA. The Georgia Court of Appeals, when deciding the case *sub judice,* cited the *Williams* precedent for the proposition that Respondent MARTA was subject to workers' compensation. *Brooks-Powers v. MARTA* at 391, 804.

C. The Second Circuit Failed To Consider Waiver Of Sovereign Immunity By New York And Thus Established Erroneous Federal Precedent Affecting The Rapid Transit Industry.

The Second Circuit held that an employee of a rapid transit authority was permitted to sue the authority in tort under FELA in *Greene v. Long Island Railroad Company,* 280 F.3d 224 (2nd Cir. 2002) *cert. denied in Metropolitan Transportation Authority v. Greene,* No. 02-1173 (U.S. Supreme Court, May 19, 2003). The Second Circuit's decision is erroneous for failure to properly answer the fundamental question of whether the Metropolitan Transit Authority ("MTA") had waived sovereign immunity against tort actions by employees for bodily injuries arising out of and in the course of employment. The required analysis of *Alden v. Maine* was completely omitted by the Second Circuit.

1. Like Georgia, New York has expressly defined its public authorities as employers subject to the New York workers' compensation act.

New York has an express waiver of sovereign immunity in its workers compensation act which reads, in pertinent part: "'Employer' ... means ... the state, a municipal corporation, fire district or other political subdivision of the state, and every authority or commission heretofore or hereafter continued or created by the public authorities law." N.Y. Work. Comp. §2 (McKinney 1992). The legislature clearly manifested an unequivocal categorical inclusion of public authorities under the workers' compensation act. The MTA as a New York public authority has clearly had its sovereign immunity waived for the purposes of workers' compensation. The intent of the New York legislature is readily apparent. As in Georgia, New York has waived sovereign immunity against employee claims for bodily injury arising out of and in the course of employment on the condition that such claims be pursued under workers' compensation.

2. The error made by the Second Circuit

The Second Circuit never considered the black letter law of New York. If the Second Circuit had followed this Court's interpretation in *Alden,* it should have ruled that New York did not consent to be sued in tort by employees. The Second Circuit decision is in conflict with the correct analysis made by the Georgia Court of Appeals in *Williams v. MARTA* and followed in the case *sub judice.*

CONCLUSION

The questions presented by Petitioner in her petition for a writ of certiorari do not merit consideration. This Court should answer the threshold question on waiver of sovereign immunity by affirming the decision in the case *sub judice* based on the holding in *Williams* that MARTA waived sovereign immunity only for purposes of workers' compensation.

Respectfully submitted.

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